PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term 1997

MURAT M. TANIK,

Petitioner,

v.

SOUTHERN METHODIST UNIVERSITY; Jeff Kennington,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI

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35 pp

Questions Presented for Review

1. Whether the decision of the court of appeals, approving a special, lesser standard of judicial scrutiny than that applied in other employment contexts, for claims of discrimination against universities by professors denied tenure, is inconsistent with Title VII, which generally prohibits discrimination without regard to type of employer and employment decision?

2. Whether the decision of the court of appeals is inconsistent with the decision of this Court in *EEOC V. University of Pennsylvania, 493 U.S. 182 (1990)*, rejecting any limitation on judicial scrutiny under Title VII of tenure decisions by universities?

3. Whether the decision of the court of appeals is inconsistent with the sound rule of other courts of appeal rejecting limited judicial scrutiny of tenure decisions by universities in discrimination cases?

4. Whether the decision of the court of appeals, in setting forth a test for determining the existence of a prima facie discrimination claim in the tenure context, but then rejecting the clear adequacy of Tanik's summary judgment evidence, is inconsistent with the proper application of Rule 56 of the Federal Rules of Civil Procedure and the decision of this Court in *St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)*?

Rule 14.1(b) Statement

The caption of this petition reflects all parties to the proceeding in the court whose judgment is sought to be reviewed. Petitioner is not aware that Southern Methodist University, one of the respondents and the only corporate party to such proceeding, has any parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Murat M. Tanik ("Tanik") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in favor of Respondents Southern Methodist University ("SMU") and Jeffrey L. Kennington ("Kennington").

Opinions Below

The per curiam opinion of the court of appeals (Pet. App. 1a) is reported at 116 F.3d 775. The District Court for the Northern District of Texas (Barefoot Sanders, J.) did not issue an opinion.

Jurisdiction

The court of appeals entered judgment on July 3, 1997. Pet. App.2a. On August 20, 1997, it denied a rehearing. Pet. App. 3a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

Statutory Provisions and Rules Involved

The statutory provisions involved in this appeal consist of 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Rule 56 of the Federal Rules of the Civil Procedure is also involved in this appeal. Copies of §1981 and pertinent provisions of Title VII and Rule 56 are set forth in the Appendix Pet. App. 4a-6a.

Statement of the Case

A writ of certiorari is appropriate in order to uphold Title VII and the decision of this Court in *University of Pennsylvania v. EEOC, 493 U.S. 182 (1990)* and to secure uniformity among the courts of appeal on a recurring issue of exceptional importance in the operation of universities in the United States: whether Title VII and other discrimination laws apply to tenure decisions to the same extent as other employment decisions made by employers. In its decision, the court of appeals granted unique, favored treatment to universities faced with claims of discrimination in the tenure process made under 42 U.S.C. §1981 Title VII and the corresponding Texas discrimination law. That distinct lesser standard of judicial scrutiny is not consistent with Title VII, the *University of Pennsylvania* decision or the decisions of courts of appeals in at least two other circuits, the First and Third. The court of appeals not only diverged from the clear dictate of Title VII, and decisions of this Court and other courts of appeal, but violated the cardinal principle that employment discrimination is intolerable in any context, a principle which this Court has repeatedly accorded the highest national priority.

The court of appeals, in defining a test for a prima facie case in the tenure context, but rejecting the sufficiency of Tanik's summary judgment evidence to meet that test, also violated Rule 56 and the principles of its proper application addressed by this Court in *St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).*

A. Factual Background

Tanik is of Turkish ethnicity and national origin. In January 1987, Tanik was hired by SMU as a professor in the Computer Science and Engineering ("CSE") Department. During Kennington's fourteen year period of chairmanship of the CSE Department and a predecessor department prior to Tanik's consideration for tenure, no professor who was not a white American earned tenure in either of those departments. Tanik was one of only three professors considered for tenure in the CSE Department prior to 1995. The others consisted of Margaret Eich, a white American female, granted tenure in 1990, and Jose Dula, an Hispanic South American-born male, considered for tenure in 1993 at the same time as Tanik, and also denied tenure.

Kennington consistently made comments on the nationality and citizenship of faculty candidates and Eich also made a number of such comments. Kennington stated at one point, "I prefer not to have a citizen of Korea." He also did not want professors from Japan or Taiwan. Kennington also opposed the hiring of several other professors not white American. Kennington has also always held the view that there are only three races: white, black and yellow. SMU's provost, an expert in ethnicity, called Kennington's white/yellow/black view of the human race as "a totally inaccurate understanding of the word race as well as the history of racial topologies."

In dealing with graduate students as well, Kennington preferred white Americans.

In 1989, Eich was considered for tenure in the CSE Department, and obtained tenure. Tanik was more

qualified and achieved many objectives Eich did not. Among other things, (a) Tanik had more work experience, (b) Tanik supervised more Ph.D. candidates, (c) Tanik supervised more master's degree candidates, (d) Tanik established a large active Ph.D. research group, not the case with Eich, (e) Tanik co-authored, or singly authored, papers and book chapters at a level much greater than Eich, (f) Tanik published five books prior to tenure, including books with students, while Eich had no books published at any time in her career, (g) Tanik co-edited three special issues of a technical publication, (h) Tanik obtained a substantial amount of research grants or scholarship support, well in excess of Eich, (i) Tanik won a number of teaching awards, including one SMU-wide award, (j) Tanik chaired several high-level professional conferences, not the case with Eich, (k) Tanik won national awards for service to his profession, (l) Tanik was invited to serve on national and international professional advisory boards, (m) Tanik co-founded an international professional conference and was responsible for SMU being a sponsor, (n) Tanik served on a number of department committees and advised a number of student professional organizations by comparison with Eich's very limited role, (o) Tanik wrote on teaching technique, (p) Tanik established a laboratory, which Eich did not.

Despite the objective superiority of Tanik, the standards for tenure involving research, teaching and service applied to Eich and Tanik differed dramatically. Tanik met Kennington's own stated research and publishing requirement but Eich did not. Tanik's professional service exceeded the comparable record of Eich, in terms of grants, including private grants, of which Eich had none. Tanik received the highest recommendation from leaders in his field, including one that ranked Tanik "far

above many of my tenured associated professor colleagues." Eich did not. Tanik received in his evaluation many favorable student comments and over forty separate letters from students and former students submitted to the provost during Tanik's tenure consideration.

In connection with the consideration of Tanik for tenure beginning in 1992, Kennington and other SMU representatives, in each case intentionally, engaged in practices and applied procedures and substantive standards not applied to Eich. These included the following: (a) differences in the context and form of the letters to outside reviewers, prejudiced against Tanik, (b) differences in the procedure used to contact outside reviewers, (c) improper disclosure of confidential information to Eich concerning the tenure process, not the case with Tanik, (d) a failure by Kennington to include favorable references to Tanik's teaching evaluations, awards, curriculum development, graduate student load and other such matters in his dossier for Tanik although duly reported to him, (e) the lack of any effort, as in Eich's case by Kennington to improve Tanik's prospects of tenure after her dossier was completed, (f) a selective, misleading presentation by Kennington of teaching evaluation data in Tanik's dossier not consistent with his method of analysis of Eich's teaching ability, (g) a method of choosing outside reviewers different for Eich than for Tanik, prejudicial to Tanik and viewed as unjustifiable by the head of SMU's ethics committee, (h) a misrepresentation by Kennington of Tanik's outside reviews as negative despite the fact that <u>all</u> reviewers recommended that SMU grant him tenure, and in some cases also

recommended that he would get tenure at their institutions, (i) other misleading statements in Kennington's recommendation letter as to Tanik, including misleading descriptions of grants, attendance and research, (j) assistance to Eich in the formulation of Eich's resume and personal statement and other consultation concerning the tenure process not afforded to Eich.

By a vote of 3 to 2, Tanik was not recommended tenure at the level of the CSE Department. The Dean of SMU's Engineering Department, Andre Vacroux, was required to consider the matter and to appoint an advisory committee for that purpose. Contrary to the school's stated rules, Kennington appointed to the committee Eich, not a full professor, and another associate professor who was a subordinate to the chairman of the advisory committee and dependent upon him for promotion to full professor. The advisory committee, based on the original dossier, voted against his tenure by a vote of 4 to 3. Tanik then asked for the right to supplement his dossier, and the Dean then resubmitted the issue to his advisory committee. In both its original consideration and reconsideration, all members of the majority were white Americans and two of the three members of the minority were not white Americans. The majority stated that the additional information provided by Tanik did not provide additional material information. However, the minority report reflected a favorable opinion of Tanik's tenure and an explicit review of the additional materials provided. Despite the minority report, the Dean decided not to recommend Tanik's tenure and so advised SMU's then Provost, Ruth Morgan. In the Dean's letter to the Provost, he made statements concerning the alleged

ranking of journals in which Tanik published inconsistent with the practice in the field.

Tanik appealed the Dean's decision to Provost Morgan by letter alleging numerous procedural irregularities. As the result of the procedural issues raised by Tanik, the Provost appointed a committee headed by law professor Thomas Mayo. The committee ultimately determined that there should be a reconsideration. The issue before the committee was "whether there had been a denial of basic fairness." After receipt of the Mayo committee report, the Provost mandated a new tenure review for Tanik, but only after three months. However, her mandate provided for only a several month accelerated period for the new tenure review. Specifically, it was limited to a matter of days and weeks, rather than six months, the normal period. The new process also did not reduce the significance of Kennington's involvement except as to compilation of the dossier. Also, new outside reviewer letters were not obtained although the original letters had been solicited by a means not consistent with the manner in which they had been solicited for Eich.

After the new review was ordered, Kennington called a new faculty meeting, where a lawyer was present. Dan Moldovan, a new professor in the CSE Department of non-American national origin, voted in favor of tenure, making the vote of the CSE Department an even split, and in his letter, referred in detail to new materials in Tanik's second dossier. Kennington and Eich reiterated their prior positions against tenure and did not refer to any new materials. Once the issue of Tanik's tenure was re-presented to the Dean, his newly

appointed advisory committee voted in favor of his tenure as did the Dean. The Dean's decision was reversed by a new Provost Anya Royce, who had not previously reversed the Dean. The Provost's decision was made with some consultation with the standing rank and tenure committee of the council of deans which advises the provost. SMU's counsel appeared at one of the committee's several meetings to address Tanik's tenure case, the first time in at least thirteen years. During the council of deans deliberations, the negative recommendation letter from Kennington was critical.

After the Provost's decision was appealed to the President of SMU, he denied Tanik tenure as well. Before deciding against tenure, the President received correspondence from Billy Abraham, chairman of the SMU ethics committee, who urged that Tanik's denial of tenure not be simply affirmed based on a concern over process, selective recitation of negative opinions by reviewers in the face of other positive opinions, the method of soliciting reviewer opinions and the lack of resolicitation of outside opinions.

B. Prior Proceedings in this Case

Tanik asserted claims under §1981 and Title VII on account of discrimination on the basis of race and national origin in connection with his denial of tenure by SMU. Jurisdiction was founded on the existence of a federal question under 28 U.S.C. §1331.

SMU and Kennington filed a motion for summary judgment. Tanik filed a response supported by significant excerpts of the depositions of Tanik and

various SMU representatives as well as seventeen affidavits of former students and academic peers of Tanik, including the two leaders in Tanik's field.

The District Court ruled against Tanik at the close of oral argument without writing an opinion. Tanik then appealed to the court of appeals, and after briefing but without oral argument, the panel affirmed the decision of the district court in a per curiam decision dated July 3, 1997. Pet. App. 1a.

The decision of the court of appeals justified its affirmance by reference to a purported rule of special favored treatment of tenure decisions, citing no Fifth Circuit precedent, but rather only two older decisions from two of the eleven other Circuits. *Zahorik v. Cornell University, 729 F.2d 85 (2d Cir. 1984)*; *Kumar v. University of Massachusetts, 774 F.2d 1 (1st Cir. 1985)*. Pet. App. 1a. The court specifically held that "[o]ther circuits have recognized that tenure decisions for colleges and universities involve consideration that set them apart from other kinds of employment decisions. Those factors are: (1) tenure contracts require unusual commitments as to time and collegial relationships, (2) academic tenure decisions are often non-competitive, (3) tenure decisions are usually highly decentralized, (4) the number of factors considered in tenure decisions is quite extensive, and (5) tenure decisions are a source of unusually great disagreement." *Id.*

Relying only on *Zahorik*, the decision then stated that "tenure decisions are not, however, exempt from judicial scrutiny under Title IV," and identified a special standard for evaluating the triability of discrimination

claims in the tenure context. *Id.* It held that a plaintiff may prove a prima facie case by "show[ing] 'departures from procedural regularity,' 'conventional evidence of bias on the part of the individuals involved', or that the Plaintiff is found to be qualified for tenure by 'some significant parties of the departmental faculty, referents or other scholars in the field.'" (Emphasis on "or" added). *Id.* Notwithstanding the weight of the evidence submitted by Tanik complying with that standard, the court of appeals held that summary judgment was proper, referring to "the unique nature of the tenure decision." *Id.*

Tanik sought a rehearing en banc, which was denied by order dated August 20, 1997. Pet. App. 3a.

Reasons for Granting the Petition

Certiorari should be granted pursuant to Rule 10 because the decision of the court of appeals addresses an important federal question in a manner inconsistent with the decisions of other courts of appeals and relevant decisions of this Court.

The decision of the court of appeals flouts the principle reflected in Title VII and enunciated by this Court in *EEOC v. University of Pennsylvania,* and recognized by several other courts of appeal, that universities have no special protection under Title VII.

The holding of the court of appeals violates Title VII because that statute originally contained an exemption for universities, but the exemption was repealed.

It conflicts with the decision in *University of Pennsylvania* since this Court strongly denounced, in that case, special treatment of universities in discrimination cases, based in part on the repeal of the exemption for universities in Title VII. The decision of the court of appeals also ignores the rule, followed by at least two other circuits, consistent with the *University of Pennsylvania* decision, that claims of discrimination in the tenure context are to receive no less scrutiny than other employment discrimination claims.

The court of appeals, in according SMU and Kennington more liberal treatment than they deserved, also violated Tanik's rights in another fashion. Specifically, the court of appeals established three alternate tests for determining the existence of a prima

facie case of discrimination in the tenure context, but affirmed the summary judgment entered by the district court despite Tanik's meeting each alternative test. In so affirming the district court, it violated Rule 56 of the Federal Rules of Civil Procedure, which entitles a plaintiff to a trial when he offers evidence raising a prima facie case, and derogated from the principles for determining the existence of a prima facie case which this Court enunciated in *St. Mary's Honor Center v. Hicks, 501 U.S. 502 (1993).*

I.

The Decision of the Court of Appeals Violates Title VII

The fact that Tanik's claim of discrimination involved the institution of tenure did not justify a lesser standard of scrutiny. Congress specifically addressed the propriety of a special case for universities and found it wanting when it removed an exemption for educational institutions from Title VII based on the legislative finding that "[t]o permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination." *See Brown v. Trustees of Boston Univ., 891 F.2d 337, 345 (1st Cir. 1990).* As observed in *Brown* (decided contemporaneously with this Court's decision in *University of Pennsylvania*), the repeal of the exemption for universities meant that any argument for a lesser standard of scrutiny must be rejected as a matter of legislative intent. In the *University of Pennsylvania* decision, this Court specifically addressed the issue as well, describing the details of the repeal of the exemption for universities in Title VII and stating that "the effect the elimination of this exemption was to

expose tenure determinations to the same enforcement procedures." 493 U.S. at 190. The statute itself makes no special provision for universities in its definition of "employer" or for tenure decisions in its definition of illegal conduct. 42 U.S.C. §§2000e(a) and (b) and 2000e-2. Pet. App. 5a. This Court should uphold such legislative intent and plain language by reviewing and reversing the decision of the court of appeals. As this Court recognized in *McKennon v. Nashville Banner Publ. Co., 513 U.S. 352 (1995)*, this Court must be very careful to avoid judicially-created exceptions to the employment discrimination laws which would defeat their dominant purpose to eradicate discrimination in the workplace.

II.
The Decision of the Court of Appeals Is Inconsistent with this Court's University of Pennsylvania Decision

Consistent with Title VII, this Court held in 1990 that tenure decisions have no special immunity from examination under discrimination statutes or even deserve a level of deference greater than that accorded to any other challenged employment decisions. *EEOC v. University of Pennsylvania, 493 U.S. 182 (1990)*. As this Court stated: "[a]lthough tenure decisions are part of the heart of academic freedom, academic freedom does not include the freedom to discriminate against tenure candidates." 493 U.S. at 190. Based on that rationale, this Court denied a special peer review privilege for documents in the tenure process. That holding, denying favored treatment of documents used by universities in the tenure process, cannot be squared with the decision

of the court of appeals, granting favored treatment to universities in the tenure process as a whole, and requires review and reversal of the decision of the court of appeals.

III.
The Decision of the Court of Appeals Is Inconsistent with Recent Decisions of the First and Third Circuits

Three appellate decisions in two other circuits, ignored by the court of appeals, directly conflict with its rule of special deference to tenure decisions. *Roebuck v. Drexel Univ., 852 F.2d 715 (3d Cir. 1988)* ("Academic institutions and decisions are not ipso facto entitled to special treatment under federal laws prohibiting discrimination"); *Brown v. Trustees of Boston Univ., 891 F.2d 337, 345 (1st Cir. 1990)* ("[t]o permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination."); *Bennun v. Rutgers State Univ., 941 F.2d 154 (3d Cir. 1991).* The court in *Bennun* addressed the issue most squarely:

> The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to ensure the award of a meaningful remedy. Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands.

941 F. 2d at 174. *See also Jew v. Univ. of Iowa, 749 F.Supp. 946, 962 (S.D. Iowa 1990)* ("Although tenure decisions are part of the heart of academic freedom, academic freedom does not include the freedom to discriminate against tenure candidates . . . . [and] to deny tenure because of the intrusiveness of the remedy and because of the University's interest in making its own tenure decisions would frustrate Title VII's purpose of 'making persons whole for injuries suffered through past discrimination.").

In order to resolve the contradiction between the decision in this case and those strong pronouncements of other courts of appeals, the Court should review the decision of the court of appeals and reverse it.

IV.
The Decision of the Court of Appeals Is Inconsistent with Rule 56

By its decision in *Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (1996)* and its decisions since that time based on *Rhodes*, the court of appeals announced a uniform general standard of review applicable to summary judgment motions in discrimination cases made under Rule 56 of the Federal Rules of Civil Procedure. The court of appeals referred to this Court's decision in *St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)* as a basis for its decision.

The standard set forth in *Rhodes* is whether there is a conflict in evidence as to the Plaintiff's claim of

discrimination "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions"). The court of appeals further stated in *Rhodes*:

> Thus, a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [a prohibited reason] was a determinative factor in the actions of which plaintiff complains.

75 F.3d at 989.

Judged by that holding, the court of appeal's treatment of the evidence submitted by Tanik was inconsistent with its own definition of the means of establishing a prima facie case in the tenure context and with *Rhodes*. It was also contrary to *St. Mary's Honor Center v. Hicks,509 U.S. 502 (1993)* insofar as that decision dictates trial of discrimination claims in which there is direct proof of bias and other proof sufficient to raise an issue of fact as to the other elements of the claim. Tanik's summary judgment evidence well established triable issues of fact with respect to the three tenure-specific elements of a viable discrimination claim identified by the panel to an extent that was in any objective sense very compelling and even overwhelming.

First, there were numerous forms of separate and distinct treatment in the process of consideration of tenure between Tanik and Eich, the other candidate who

received tenure and who Appellants agreed was the proper comparison. These included both procedural and substantive differences. The procedural differences were so stark that a reconsideration of all or part of Tanik's tenure was twice ordered, but even then, the process on reconsideration was distinctively prejudiced against Tanik. Second, there was also unmitigated evidence of racial and national origin bias by Kennington, some acknowledged by him, and some taking the form of consistent less favorable treatment of individuals not white and not Americans. SMU's Provost acknowledged the primitiveness of the racial view of Kennington. Third, Tanik presented evidence of substantial or overwhelming support for his tenure at SMU, including unanimous support for tenure at SMU from his outside reviewers, support from three of the five colleagues within his department, support from five of the seven professors within his school outside his department who served on the first and second advisory committees constituted to review his tenure, and support by the Dean as well.

Thus, under the very holding of the court of appeals, the *Rhodes* decision, and *St. Mary's Honor Center*, Tanik's claims were clearly triable on all three of the alternative grounds identified by the court of appeals. The decision of the court of appeals to the contrary was therefore a violation of Rule 56 and inconsistent with this Court's decision in *St. Mary's Honor Center*. In order to uphold Rule 56, this Court should review and reverse the decision.

Conclusion

The legislative history of Title VII, and the weight of this Court's *University of Pennsylvania* decision and decisions of courts of appeals not addressed by the panel, require the conclusion that tenure decisions have no special immunity to examination under discrimination statutes or even a level of deference greater than that due any other challenged employment decisions. The decision of the court of appeals also conflicts with the proper application of Rule 56 in employment discrimination cases and this Court's decision in *St. Mary's Honor Center.* This Court should accordingly issue a writ of certiorari to the court of appeals to address the conflict between its decision and such other legal dictates. The public interest mandates that this Court do so to provide appropriate guidance to professors and their institutions of higher learning in the conduct of tenure review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been delivered by first class mail to Michael H. Collins, Locke Purnell Rain Harrell, P.C., 2200 Ross Ave., Suite 2200, Dallas, Texas 75201-6776, on this 1st day of October, 1997.

_____

Robert E. Goodman, Jr.

United States Court of Appeals,
Fifth Circuit.

No. 96-10612

Summary Calendar.

Murat M. TANIK, Plaintiff-Appellant,

v.

SOUTHERN METHODIST UNIVERSITY; Jeff Kennington, Defendants-Appellees.

July 3, 1997.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, KING and SMITH, Circuit Judges.

PER CURIAM:

Murat M. Tanik, a native of Turkey, instituted this action against his former employer, Southern Methodist University (SMU) and Jeffrey Kennington, alleging employment discrimination on the basis of his race and

national origin. Tanik asserted claims under Title VII of the Civil Rights Act of 1964, as amended at 42 U.S.C. § 2000e, et seq., 42 U.S.C. § 1981, § 1985, and § 1986, and Texas Labor code § 21.001, et seq. The district court granted the defendants' motion for summary judgment and dismissed all claims. Tanik appeals.

The elements of the Title VII claim and the § 1983 claim are identical. The court evaluates these claims according to a single analysis.[1] Similarly, the Texas statute is basically identical with, and has been interpreted in conformance with, Title VII[2].

As is well known, in a Title VII case the plaintiff must first establish a prima facie case of discrimination.[3] To establish a prima facie case in the context of a denial of tenure, the plaintiff must show that: (1) he belongs to a protected group, (2) he was qualified for tenure, and (3) he was denied tenure in circumstances permitting an interference of discrimination.[4] If the plaintiff establishes a prima facie case, then he has raised a presumption of discrimination and the burden shifts to

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[1] Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1284 n. 1 (5th Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 1099, 130 L.Ed.2d 1066 (1995).

[2] Dallas Fire Fighters Ass'n v. City of Dallas, Tex., 885 F.Supp. 915, 927 (N.D.Tex.1995).

[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).

[4] Zahorik v. Cornell University, 729 F.2d 85, 92 (2nd Cir.1984).

the defendant to articulate some legitimate, non-discriminatory reason for the challenged action.[5] If the defendant meets this burden by presenting evidence which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action, then the presumption raised by the plaintiff's prima facie case essentially disappears, and the plaintiff is left with the ultimate burden, which has never left him: that of proving that the defendant intentionally discriminated against him.[6]

Other circuits have recognized that tenure decisions in colleges and universities involve considerations that set them apart from other kinds of employment decisions.[7] Those factors are: (1) tenure contracts require unusual commitments as to time and collegial relationships, (2) academic tenure decisions are often non-competitive, (3) tenure decisions are usually highly decentralized, (4) the number of factors considered in tenure decisions is quite extensive, and (5) tenure decisions are a source of unusually great disagreement.[8]

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[5] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).

[6] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509-12, 113 S.Ct. 2742, 2748-50, 125 L.Ed.2d 407 (1993).

[7] Zahorik v. Cornell University, 729 F.2d 85, 92 (2nd Cir.1984); Kumar v. University of Massachusetts, 774 F.2d 1, 11 (1st Cir.1985).

[8] Zahorik, 729 F.2d at 92-93.

Tenure decisions are not, however, exempt from judicial scrutiny under Title VII. To prove a prima facie case, a plaintiff may be able to show "departures from procedural regularity", "conventional evidence of bias on the part of individuals involved", or that the plaintiff is found to be qualified for tenure by "some significant portion of the departmental faculty, referrants or other scholars in the particular field".[9]

Considering all the evidence, in the light of the unique nature of the tenure decision, we conclude that there is no evidence that unlawful discrimination played any role in SMU's decision to deny tenure to Tanik and that SMU presented legitimate non-discriminatory reasons for the denial of tenure. Accordingly, the judgment of the district court is AFFIRMED.

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[9] Id. at 93-94.

United States Court of Appeals

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth CIrcuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 96-10612 Tanik v Southern Methodist
USDC No. 3:95-CV-914-H

Enclosed is a copy of the court's decision, and judgment has been entered under FRAP 36. (However, the opinion may yet contain typographical or printing errors which are subject to corrections.)

FRAPs 39 through 42, and Local Rules (LR) 35, 39, and 41 govern costs, rehearings, and mandates. New LR's 35.2.10 and 40 require that a copy of the opinion or order sought to be reviewed shall be bound with the petition for rehearing or suggestion for rehearing en banc as an appendix but shall not be marked or annotated. Plese read carefully the Internal Operating Procedures (IOP's) following FRAP 40 and LR 35 for a discussion of when a rehearing may be appropriate, the legal standars applied and sanctions which may be imposed if a nonmeritorious suggestion for en banc is made.

Direct Criminal Appeals. LR 41 provides that a motion for a stay of mandate under FRAP 41 shall not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate a substantial question is to be presented to the Supreme

Court. Otherwise, the motion may be denied and the mandate issued immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and will be considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FRAP 41. The issuance of the mandate does not affect the time, or your right, to file such a petition.

The judgment entered provides that appellant pay to appellee the costs on appeal.

Sincerely,

CHARLES FULBRUGT

By:

_____

Rhonda Flowers, Deputy Clerk

United States Court of Appeals,
Fifth Circuit.

No. 96-10612

Murat M. TANIK, Plaintiff-Appellant,

v.

SOUTHERN METHODIST UNIVERSITY; Jeff Kennington, Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON SUGGESTION FOR REHEARING EN BANC
Opinion 7/3/97

Before WISDOM, KING, and SMITH, Circuit Judges

PER CURIAM

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is Denied. No member of the panel nor judge in regular active service ofthe court having requested the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

John Minor Wisdom

42 § 1981. Equal rights under the law

•(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. •(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. •(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 § 2000e. Definitions.

For the purposes of this subchapter -

•(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers. •(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 § 2000e-2. Unlawful employment practices

•(a) Employer practices

It shall be an unlawful employment practice for an employer -

•(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or •(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

FRCP 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c)Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by

interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts therof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may

order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.